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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

DEMETRIUS EUGENE,

Defendant and Appellant.

B277464

(Los Angeles County  
Super. Ct. No. BA333770)

APPEAL from an order of the Los Angeles Superior Court,  
Melissa Widdifield, Judge. Affirmed.

Lenore De Vita, under appointment by the Court of Appeal,  
for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

In his third appeal related to a 15-year-old judgment for multiple counts of grand theft and perjury by declaration, Demetrius Eugene challenges the trial court's restitution order. Following a review of the record Eugene's appointed counsel identified no meritorious issues; our own independent review of the record and analysis of the contentions presented by Eugene in two lengthy supplemental briefs similarly identified no error. We affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### *1. Eugene's Underlying Case and Two Prior Appeals*

Over several years, Eugene was involved in a series of complex child care fraud activities, acting as both a fraudulent provider of child care and a fraudulent employer of parents receiving funds for government-subsidized child care. (*People v. Eugene* (Aug. 26, 2013, B240874 [nonpub. opn.] at pp. 1-2.)

In 2011, a jury convicted Eugene of six counts of grand theft and six counts of perjury by declaration in Case No. BA333770. The jury also found that the total taking involved more than \$200,000. (*People v. Eugene, supra*, B240874, at p. 2.) After the jury trial, pursuant to a negotiated disposition, Eugene pleaded guilty to an additional three counts of grand theft in a new case, Case No. BA332599, and admitted the associated enhancement allegations in return for a state prison sentence of 14 years on all charges, both those he had pleaded guilty to and those on which he had been convicted by the jury. (*Id.* at p. 3.)

Following Eugene's first appeal, on August 13, 2013, this court reversed the judgment with respect to one global count of

grand theft that encompassed all of the other grand thefts in Case No. BA333770. (*People v. Eugene, supra*, B240874, at p. 8.)

On August 15, 2014, the trial court ordered Eugene to pay victim restitution of \$456, 836.61, with credit for sums already paid, plus 10 percent interest from December 29, 2011 in Case No. BA333770. Eugene appealed from the order, arguing it included losses relating to counts on which he was not convicted by a jury or were reversed. (*People v. Eugene* (Feb. 10, 2016, B259289) [nonpub. opn.] )

This court reversed and remanded the restitution order for the trial court to calculate the victim restitution award based solely on the losses on the counts on which Eugene was convicted in Case No. BA333770 and to impose the mandatory fine pursuant to Penal Code section 186.11, subdivision (c). (*People v. Eugene, supra*, B259289, at pp. 5-6.)

## *2. The Proceedings on Remand and the Current Appeal*

On remand, at the scheduled restitution hearing on May 19, 2016, Eugene's appointed counsel, bar panel attorney Stanley Arouty, advised the trial court that Eugene was no longer in custody. Mr. Arouty explained Eugene was not in court because he had not been notified of the restitution hearing at his current address in Hemet, California. The court confirmed it now had Eugene's Hemet address and would send Eugene notice of the restitution hearing; the court continued the hearing to August 12, 2016.

When Eugene did not appear on August 12, 2016, Mr. Arouty advised the trial court he had spoken to Eugene, who had elected not to appear. Mr. Arouty stated Eugene "was working" and "won't tell me where he's working." The court

asked Mr. Arouty if Eugene had completed a waiver of his right to appear in court. Mr. Arouty answered, “I couldn’t get him to get [sic] anything. Couldn’t get ahold of him for the longest time. He just sent me an email saying ‘object to everything. I’m not going to be there. You stand in.’” Mr. Arouty informed the court he believed Eugene had decided not to appear because “he’s taken the position . . . that he’s still under federal appeal.”<sup>1</sup> The trial court found that Eugene had willfully failed to appear at the hearing and had therefore knowingly waived his presence in court.

The parties stipulated, and the trial court agreed, that the total amount of restitution in Case No. BA333770 was \$224,871.98 and the Penal Code, section 186.11, subdivision (c) fine was \$449,743.96.

## **DISCUSSION**

On August 31, 2016, Eugene filed a notice of appeal from “a judgment after court trial” and “judgment after and order granting a summary judgment motion,” which we construe as an appeal from the August 12, 2016 restitution order. We appointed counsel to represent Eugene on appeal. After examination of the record, counsel filed an opening brief in which she raised no issues. On March 27, 2017, we advised Eugene he had 30 days to personally submit any contentions or issues he wished us to consider.

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<sup>1</sup> The trial court asked Mr. Arouty to provide a copy of Eugene’s email for the court file. The record on appeal does not contain that document.

On April 4, 2017, we received from Eugene a typed 31-page “Supplemental Appellant’s Brief” with attached exhibits. We had previously received on September 8, 2016 a typed 25 page “Appeal” with attached exhibits. Eugene contends that: the trial court infringed his Sixth Amendment right to self-representation at the restitution hearing (*Faretta v. California* (1975) 422 U.S. 806, 835-836 [45 L.Ed.2d 562, 95 S.Ct. 2525] (*Faretta*)); he should not be compelled to pay restitution on the three grand theft counts to which he had pleaded guilty; he was improperly subjected to multiple grand theft convictions by a jury; the restitution order was improperly based on the multiple grand theft convictions; the restitution awards for counts 53 and 72 (jury convictions) were based on insufficient evidence and violate the statute of limitations; and the trial court improperly awarded restitution to “fictitious entities,” the State of California and the County of Los Angeles.

Eugene’s claims identify no error.

1. *Eugene’s Right to Self-Representation*

Eugene argues his Sixth Amendment right to self-representation at the restitution hearing was violated by “the intrusive participation of his trial attorney,” Mr. Arouty. Eugene contends the court “was aware” Eugene was representing himself from a petition for habeas corpus he had filed earlier on his own behalf asserting Mr. Arouty had provided ineffective assistance of counsel. Eugene also claimed the court “never informed [him] directly of any restitution hearings” although his “current address was known to the court well before the restitution hearing.”

“Under the Sixth and Fourteenth Amendments, a criminal defendant has two mutually exclusive rights at all critical stages of a criminal prosecution—the right to counsel and the right to self-representation.” (*People v. Fedalizo* (2016) 246 Cal.App.4th 98, 103-104 (*Fedalizo*), citing *Faretta, supra*, 422 U.S. at p. 819.) Unlike the right to counsel, the right to self-representation, “must be clearly, timely, and effectively invoked. Effective invocation of the right to self-representation requires a defendant to waive the right to counsel knowingly, intelligently, and voluntarily. [Citations.] Courts must indulge every reasonable inference against waiver of the right to counsel.” (*Fedalizo, supra*, 246 Cal.App.4th at p. 104.)

Eugene was represented by Mr. Arouty during the plea hearing and the proceedings on remand. At the August 12, 2016 restitution hearing, Mr. Arouty appeared and represented to the court that Eugene had waived his presence and had urged Mr. Arouty to appear on Eugene’s behalf and to object to the restitution award. In turn, the court found Eugene had waived his right to be present at the hearing.

The record contains no evidence that Mr. Arouty misrepresented his authority to appear for Eugene and waive his presence. We cannot presume on the record that counsel was appearing without Eugene’s consent, particularly in light of Eugene’s failure to be present at the hearing. (*Fedalizo, supra*, 246 Cal.App.4th at p. 105 [“Perhaps the most fundamental rule of appellate law is that the judgment challenged on appeal is presumed correct, and it is the appellant’s burden to affirmatively demonstrate error.”].) “To do otherwise would be contrary to the basic requirement that we ““indulge in every presumption to uphold a judgment””” and that we look to the

appellant to show error.” (*Ibid.*) Indeed, nothing in the record indicates Eugene had unequivocally and effectively invoked his right to self-representation and waived his right to counsel for the restitution hearing.

## 2. *Obligation To Pay Restitution in Case No. B332599*

Eugene pleaded guilty in Case No. BA332599 to grand theft as alleged in counts 1, 75 and 116 as part of the negotiated disposition. Eugene expressly agreed in his negotiated plea to pay restitution on counts 1, 75 and 116 in an amount to be determined by the court.<sup>2</sup>

Eugene now claims he has no obligation to pay restitution in Case No. B332599, because the People have “waived their rights to restitution” pursuant to *People v. Harvey* (1979) 25 Cal.3d 754 and because of his interpretation of this court’s decision following Eugene’s first appeal.

Eugene’s opportunity to contest his obligation to pay restitution in Case No. BA332599 has long since passed, even if he had not agreed to pay restitution as part of his negotiated plea and had obtained a certificate of probable cause in that case. Furthermore, any issues pertaining to restitution in Case No. BA332599 are beyond the scope of this appeal, which is limited to

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<sup>2</sup> On August 15, 2014, the court determined and ordered restitution on counts 1, 75, and 116 in Case No. BA332599 and on counts in Case No. BA333770. Eugene appealed from the restitution award in Case No. BA332599, but that appeal was later dismissed at his request. (*People v. Eugene, supra*, B259289, at p. 3, fn. 2.)

the propriety of the August 12, 2016 restitution order in Case No. BA333770.

### 3. *Eugene's Multiple Grand Theft Convictions*

Relying on *People v. Whitmer* (2014) 59 Cal.4th 733, Eugene argues he was improperly convicted of multiple counts of grand theft and the August 12, 2016 restitution award was erroneously calculated based on those multiple grand theft convictions. That issue is beyond the scope of this appeal.

### 4. *Restitution Awarded on Counts 53 and 72*

Eugene challenges the restitution award in Case No. BA333770 on grand theft counts 53 and 72, both jury convictions, as not supported by sufficient evidence and barred by the statute of limitations.

“A restitution order is reviewed for abuse of discretion and will not be reversed unless it is arbitrary or capricious. [Citation.] No abuse of discretion will be found where there is a rational and factual basis for the amount of restitution ordered. “[T]he standard of proof at a restitution hearing is by a preponderance of the evidence, not proof beyond a reasonable doubt.”” (*People v. Gemelli* (2008) 161 Cal.App.4th 1539, 1542.)

The uncontroverted evidence at the restitution hearing, a chart created by the district attorney's office, established the restitution due on counts 53 and 72 was \$88,948.17 and \$82,534.36, respectively. Eugene's assertion he is not liable for restitution on these counts, contrary to the jury's findings, is beyond the scope of this appeal. The trial court did not abuse its discretion in its restitution awards for counts 53 and 72.



Eugene maintains because prosecution for the 2000-2002 acts of grand theft charged in counts 53 and 72 is barred by the statute of limitations, the restitution ordered on those counts is invalid. The four-year statute of limitations for perjury and grand theft involving fraud do not commence to run until the offenses have been discovered or completed, whichever is later. (Pen. Code, §§ 801.5, 803, subd. (c).) The record does not demonstrate that counts 53 and 72 were time-barred under those statutes. (See *People v. Moore* (2009) 176 Cal.App.4th 687, 693.)

*5. Restitution Awarded to the State of California and the County of Los Angeles*

At the conclusion of the August 12, 2016 restitution hearing, the court ordered that Eugene owed restitution in various amounts to the Los Angeles County Department of Social Services for whom payments were to be made to the County of Los Angeles, and to the California Department of Education, for whom payments were to be to Crystal Stairs, Inc.

Eugene argues the rightful owner of the appropriated funds was Crystal Stairs, the agency that had contracted with the State of California and the County of Los Angeles to distribute the funds to the recipients. According to Eugene, the county and state are not entitled to restitution because Crystal Stairs is the sole victim of his crimes.

Eugene raised this issue in the context of a sufficiency of evidence claim in his first appeal, and it was resolved against him. (*People v. Eugene, supra*, B240874, at pp. 10-11.) Those issues are not properly considered in this appeal. (See *People v. Whitt* (1990) 51 Cal.3d 620, 638 [law of the case doctrine “prevents the parties from seeking appellate reconsideration of

an already decided issue in the same case absent some significant change in circumstances”]; see generally, *People v. Barragan* (2004) 32 Cal.4th 236, 245-258.)

We have examined the record and are satisfied Eugene’s appellate attorney has complied with the responsibilities of counsel and that there are no arguable issues. (*Smith v. Robbins* (2000) 528 U.S. 259, 277-284 [120 S.Ct. 746, 145 L.Ed.2d 756]; *People v. Kelly* (2006) 40 Cal.4th 106, 118-119; *People v. Wende* (1979) 25 Cal.3d 436, 441-442.)

### **DISPOSITION**

The August 12, 2016 restitution order is affirmed.

ZELON, J.

We concur:

PERLUSS, P. J.

SEGAL, J.